

# INFORMATION

FOR

*Sir John Gordon of Park for himself, and as Assigney constitute be John Gordon of Rothemay,*

AGAINST

*The Representatives of Alexander and James Abernethies, and Isobel Halket, Relict of the said Alexander, and Arthur Forbes of Balveny.*

**T**HAT the Right Honourable the Estates of Parliament may be the more clearly and distinctly informed in this Matter, it is to be remembred, That in the year 1600: my Lord Saltoun did interdicte himself to his Friends, which Interdiction was duely published and Registrat, but in the year 1606 the same Interdiction was loosed and reduced by Decreet of the Lords of Session, and thereafter the Lord Saltoun dispones his Estate to the Lord Ochiltre, who being thereupon publicly infest, dispones several parts of these Lands, *Viz:* The Lands of *Park* and *Rothemay* to the Pursuers Grandfathers, for the just and adequat price, and be vertue of these Rights they were in peaceable Possession for near thirty yearstogether.

In this *interim*, The Lord Saltoun dyes, and his Son *Alexander* Lord Saltoun, having granted a Bond in Trust for a great sum to *Sir William Stewart*, he thereon comprises the Estate of the Lord Saltoun for my Lords behoove, and then raises a Reduction of the Disposition made by the decest *John* Lord Saltoun to the Lord Ochiltre upon the heed of Death bed, but this Proceß having failed *James Abernethie* Advocat, and *Alexander Abernethie* Agent his Brother, who mannaged this Proceß, and were the principal Mannagers of all Saltouns Affairs, fell upon a most villanous Contrivance of tearing the Decreet, lousing the Interdiction out of the publick Register, and having effectually done so, they awakened the Reduction formerly raised on the head of Death-bed, and adding and eiking to this Reason, that of *Interdiction*; The Pursuers and their Predecessors whose Defence was stollen away by the said Thift and Villany of the *Abernethies* were necessitat to suffer a Decreet of Certification to pass against them, which subjected them to many Litigious and Expensive Proceßes for near thirty years together. For after that *James Abernethie* was dead, and that *Alexander* his Brother had got the stollen Leaves into his possession, the Lord Saltoun who knew the same, induced him by Liberal Gratuities, particularly by a Bond of 20000 Merks Scots, to conceal the having thereof, and that the Receit or Concealment of the Thift might be less suspect, *Alexander* suffers a decreet of Certification to go against his own Fortune, but at the same time got a new Disposition thereof without any onerous cause. and with this farder Advantage to have his Lands holding immediatly of the King. Thereafter *Alexander* Lord Saltoun dyes, and *Alexander Abernethie* finding difficulty to recover payment of the said Bond, assigns the same to *James Ogilvie* his Nephew, and that he might the more effectually procure Payment, he makes *James* Master of the secret, and discovers to him his having of the Leaves of the Interdiction, and how that they were built up or buried in the Wall of his House; And after *Alexanders* death, *James Ogilvie* with *Isobel Hacket Alexanders* Relict, and *John Reid* his Servant, searched for and fand the stollen Leaves of the Decreet built up in the Wall, as said is; But the foresaid Bond of 20000 merks not being yet payed, and they apprehended that the discovery of the leaves would render their payment ineffectual, because there was no other fond for this payment, save the lands recovered upon the heed of the Interdiction, which the stollen leaves of this Decreet did quite take off, they continue to conceal the same till *James Ogilvie* came to die, and then thorow the force of Truth, and for the exoneration of his Conscience, he was necessitate to make a full discovery, and caused *John Abernethie* Son to *Alexander*, and one of the Defenders write his Declaration; *Viz:* That the leaves after they were found in the wall, were left in the hands of the said *Isobel Halket*, and the discovery being thus made thorow the singular Providence of GOD, *Park* and *Rothemay* pursues the said *Isobel Halket* for Exhibition; And after a long time and expensive Proceß before the Session, and the examining of many Witneßes by Commisision, whereby the having of the stollen leaves was fixed upon *Isobel Halket*, she at length exhibites the same; And the Lords after full Tryall, found the leaves to be Authentick, and a part of the Register, and ordained them to be insert in the Book whence they had been torn out.





Park and Rothemay finding themselves so much lesed by the Villany and Theft of the said *Abernethies* in manner above represented; They intent a process before the Lords of Session, against their Successors, for Reparation of the Loss and Damages they had sustained, thorow the delict and fraud of the said *Abernethies* in Stealling, Resetting and concealing the Leafs as said is. And after a full hearing, the Lords considering that the Case was singular, and that the high Court of Parliament were shortly to sit, thought good to remit the Matter to the Parliament, *Viz*: How far the Heir of the Defunct should be lyable for Reparation of the Damages sustained thorow his Predecessors wrong and fraud; Which Remit being called, and the Cause appointed to be heard before the Estates of Parliament; The precise Question debated in their presence, was, and is, *How far the Heir of the Defunct might be conveyed and made lyable for the Damage that the Pursuer had suffered thorow the Defuncts Wrong and Theft.*

And to remove all Ambiguity the Honourable Estates of Parliament are obliged to consider, 1<sup>mo</sup>. That the Question is not how far an Heir may be punished for his Predecessors Crime, which the Pursuers do freely grant, neither ought nor can be done, because that Crimes are indeed personal; And as the Law says, *noxa caput sequitur, & delicta suos tenent authores & crimina morte extinguuntur*; Which is in plain Scots, *That Crimes do only affect the person of the Delinquent, and are to be punished in his person, and are extinguished by his Death, which are most certain Truths*; And therefore when the Defenders do offer to apply these Maxims to this present Case, and make use of them for their Defence; It is in Effect, but dissingenuous, imposing upon this high and Honourable Court, seeing that the Pursuers are not seeking that the Crime of the Defunct should be punished in his Heir, but setting aside the Notion as well as words of Crime and punishment in this case, do precisely and distinctly insist, That for the wrong and damage they suffered by the Defunct, they may have Reparation of his Heir. And 2<sup>do</sup>. That the Reparation that the Pursuers do claime of the Defenders, is not only *in quantum lucrati*, or *ad eas pervenerit*, That is, *For the Benefit and Profit that they have really reaped by the Defuncts Wrong*, But plainly, *That they should be lyable for the whole damages sustained by the Pursuers, to the Value of all the Inheritance they possess by the Defunct*, Which clear Explication of the case being premised, the Pursuers do in the first place urge, that there can be nothing more evident, then that from the same Fact or Deed, there may and doth arise a double Action, *Viz*: One for punishment, respecting the Crime and Guilt of the deed, & the other meerly for reparation, which only regards the deed as a wrong, whereby the Pursuer hath been indamaged, and thus for example, if one man should wilfully burn a nothers House: It is without Contraversion, that he whose House is burnt may either pursue the Defender precisely for his damages, and to have his House, or the value, fully restored, which is a plain civil action, or he may raise a Criminal Process against the Defender to hear, and see him punished by Death for his wilful fire raising, which is a distinct Criminal Pursuit; And these two actions being thus distinguished, the case and question in hand, is precisely anent the former, *Viz*, Whether the foresaid Civil action for damages may not be intended against the delinquents Heir als well as against himself, albeit it be granted that the delinquent by his death, hath quite extinguished the other Criminal action, but the transgressor himself.

And that this Civil action arising upon a wrong for reparation of damages, and called in Law *rei persecutoria*; (Because it only pursues for the loss that the Pursuers hath suffered) may be raised, and ought to be sustained against the Heir of the wrong-doer for a full reparation, tho the Penal action for punishment die with the transgressor himself, is evident. 1<sup>mo</sup>, from all the Law that ever was known; And, 2<sup>do</sup>. From the clear rules of Justice and equity, which are the foundations of all Law, and ever the most sure and certain Rule where no positive statute occurs.

And as to the first Head of Law, the Pursuers are not to trouble the Parliament with multitude of Texts of the Civil Law, nor with the various opinions and reasonings of Lawyers upon them. But, 1<sup>mo</sup>. It is to be remembred, that the Civil Law is not our Law, and that all the observation, or regard that we have to it, is only as it contains plain Rules of Justice and Equity; and Principals of that kind that have been confirmed by our own Law and practice; So that supposing that the Civil Law (as it doth not,) did deny action for damages against the Heir for the wrong done by the Defunct; Yet seeing this is manifestly contrair to the true principles of justice and equity, we ought not at all to regard it. 2<sup>do</sup>. That it is well known; that in the Civil Law, actions were wrapt up in such forms or *formulae*, (as they called them,) and were astricted to such nice methods, that tho these might have been prudently designed by the Roman Law-givers; Yet they have left a great many difficulties and contraversies, even to the expositors of that Law; And wherever these Contraversies fall in, the Civil Law is the less to be regarded, specially where clear justice and equity stand on the other side. 3<sup>io</sup>. That even in the Civil Law, it is most certain that *actio ex malificio quatenus rei persecutoria compitebat in Haeredem*; That is, that actions arising from the wrong done by the Defunct, but intended only for the prosecution of what is wanting to the pursuer, is competent against the Defuncts Heir, as is evident from the Institutions of that Law, in the *Titles de Leg: Aquil: de actionibus, de perpet: & temporal: act. Et quae ad Haeredes & in Haeredes transeunt*, where it is plainly said in the foresaid Title *de Leg: Aquil:* That the action there treated, arising from wrong and delinquencie, would certainly descend against the Heir, if nothing were thereby sought, but pure damages, for the words are, *Hæc actio autem transitura fuisset in Haeredem, si ultra Damnum lis nunquam æstimaretur*, par: 9 *inst: ad L: Aquil: ad finem*; And in the other Title *de actionibus*, there is a clear distinction of actions, which arise from wrong or malice, *Viz*. That some of them prosecute the pain, others of them not the



the pain, but the thing wanting to the Pursuer, and a third sort that are mixt, prosecuting both the thing and the pain, p. 16: 17. *Inst. de Act.* And the only end & use of this distinction, is to teach what actions descend against the Heir and what not, it being a perpetual Rule in that Law, that actions *rei persecutoria*, or that prosecute what is wanting to the Pursuer, do descend against the Heir, which is farther confirmed by the following Tittle. *Viz, De per: & temp: act: p: 1. Istius tituli*, where it is plainly set down, that *pœnales actiones*, in opposition to such as are *rei persecutoria* *nunquam transiunt in Hæredem*, and thorow all the Civil Law, there cannot one instance be given, but that *actio rei persecutoria etiam ex malificio*, doth alwayes descend against the Heir, which is understood *in solidum*, and on the other hand, let all the Texts that were cited for the Defenders, or can be cited for to prove that *Actiones ex malificio* do not *transire in Hæredem, nisi in quantum ad eum pervenit*, be considered, and the will be found either to bear expressly, or plainly to intimate, that the Action meant, is penal, And therefore so restricted, which plainly concludes that the Pursuers present action being *rei persecutoria* is not to be restricted; But farther, the Civil Law in the matter of Thift, doth distinguish the *actio furti*, which pursued the thief for the pain, either for the double or quadruple, and the *condictio furtiva* arising from the same thift, but only for damage and interest; And as to the first, the Law is indeed plain, that the Penal action for thift did not descend against the Heir, but as to the other action arising from the same thift that was for damage and interest; The Law is most plain, and often repeated, that it did descend against the Heir, *par: ult: inst: de obl: quæ ex delicto*, and not as was alledged by the Defenders for recovery of the thing extant, or the value of it still with the Heir of the Thief, but most expressly for recovering of the Pursuers dammages and interest, even tho the thing stollen were perished without any profit to the thieves Heir, as is clear from that whole Title, *Di: de condict: furtiva*, And particularly *L: 3. D: de cond: furt:* And the Law there, is so full to this purpose, that in the third Law of that Title, the case is set down, of a Servant stollen, and repeated from the Heir or the Thief, and that the Servant was not only dead, but his Master by his death had lost an Inheritance, to which the Servant was named Heir; And the Law sayes in that Case, *Item si mortuum hominem condat, consecuturum prærium hæreditatis*, which undenyably concludes, that the *condictio furtiva*, as being *Rei persecutoria*, was given against the Heir of the Thief, for all the Pursuers Interest, tho the thing stollen had been quite perished.

Which Grounds being applied to the Case in hand, It is evident that the Pursuers Actions for dammages, is *Rei persecutoria*; For it is accounted, *actio rei persecutoria*, that pursues for what is wanting to the pursuer, whether it be a thing in his Possession, or a debt due to him, and any hurt or prejudice that he pursues in either of the two, is true Dammages, and the the Action for recovery of it is, *rei Persecutoria*; And therefore according to the plain Grounds and Analogie of the Civil Law, it must descend against the Heir, and that *in solidum*, for when an action is said to defend against the Heir, it is continually understood *in solidum*, because the Heir and the Defunct being in Law one person, it must be as extensive against the Heir, as against the Defunct himself; But when an Action descends against an Heir only, *in quantum lucratus*, then when this restriction is intended, it is alwayes exprest; And in Effect it makes the Heir lyable, not as Heir, but *tanquam quilibet*, for from any person whatomever, as well as from an Heir, the Gain or *lucrum*, that he hath by a malifice, should be taken away.

But 2<sup>do</sup>. The Pursuers Action is not only *rei persecutoria ex malificio*, But it is truly *condictio furtiva*, or a pursuit upon a Thift or Reset of Thift, committed by the Defenders Predecessor; And that it was a Thift, is clear, For it is plain in Law, *That a Thift may be committed by the taking away of Writes*, as *leg: 27 Di: de furtis*, where the taking away of *Tabulæ vel Cautiones*, that is, *Of Writes and Securities* is said to be Thift, and the awaytaker and Thief declared to be lyable in the Pursuers whole Interest. And farther, By another Law in the same Title, the Stealling of Writes out of the publick Records, or that are in *Publica Custodia*, *L: 31 D: pi: de furtis*; And consequently the Reset of them is also said to be Thift, and that an Action is thereupon competent to any person having Interest; which is most just, seeing the *Publicæ Custodie* is in Effect the *Common Custodie* for every private person. By all which it is most evident, That *James Abernethies* Stealling, and *Alexanders* Resetting of the forefaids Leafs torn out of the Register was a Thift, and that the Pursuers as parties concerned, have Just Action to pursue for their whole Interest, which as the Law sayes in the *L: 3 D: de condict: furt:* was plainly and directly *periculum hæreditatis perdendæ*, and quadrats most exactly to this Case.

To all which there was nothing replied by the Defender, save that by the Civil Law, actions *ex malificio* were never sustained against the Heir, *nisi in quantum lucratus*, or in so far as he had benefite, and that the Civil Law carryed this so far that it expressly provides that *etiam in contractu si testator dolo se versatus sit, actio in ejus Hæredem non datur, nisi in quantum ex dolo ad eum pervenit*. To which it is Answered, that it is certain by the Civil Law, that upon every Contract Actions are competent against the Heirs of the persons contracters als well as against themselves, and to alledge that in a Contract of Sale or of Location, or of Society, the Heir would not be *in solidum* lyable for the dolo or fraud of his pre-decessors is absurd and ridiculous. But, 1<sup>mo</sup>. The true meaning of the Civil Law was, that whereever the action was penal, it did only descend against the Heir *in quantum lucratus*: But if it was *rei persecutoria*, it never had any restriction, and for the action of dolo & fraud, if it arose naturally from the Contract, it most certainly descended against the Heir; But if it was an action of dolo and fraud, *ubi de his rebus alia actio non erat*, that is, when there was no other action competent in Law, then



then only was the action *de dolo* given; And it was also penal for the double, and consequently could not in that respect descend against the Heir as the Pretors Edict, and the whole Title, *D: de dolo malo* declares, which is nothing at all to the present purpose, where the Pursuers action is manifestly *rei persecutoria*, and not at all penal. But, 3<sup>io</sup>. The Defenders cannot with any ingenuity deny but in the Civil Law *condictio furtiva*, or an action for damages arising upon Theft, was simply given against the Heir *in solidum*, which is so certain, that even all the Authors almost, who alledge that actions *ex malificio* in the Civil Law, were only given against Heirs, *in quantum lucrati*, do yet agree, that *condictio furtiva*, *actio rerum amotarum*; As also, *vi bonorum raptorum*, were exceptions from the General Rule, and competent against Heirs *in solidum*, which is exactly the Pursuers case who only pursues for the damages which he sustained thorow Alexander Abernethies Receipt and concealment of the thief of the stolen Decree, and leafs lacerat, as said is.

The second heed of Law is the Cannon Law, and by that Law it is so certain, that Actions for damages arising upon the wrong done by the Defunct do descend against his Heir, that it is plainly incontestable, and farder, it is also certain and cannot be contradicted; That the Cannon Law in this point hath taken place in most of the Kingdoms and Countries of *Europ*, and even in *Holland* where *Gruen Weigen* testifies, that now the *simplicitas morum* hath every where so far prevailed, that actions for Damages upon wrong done by the Predecessors, do as certainly descend against his Heirs as actions for Civil Debt.

But to this the Defenders answer, That, It was the *Romish* Superstition, and that Heirs might relieve their Predecessors out of *Purgatorie*, that made the Cannon Law differ in this point from the Civil Law. But 1<sup>mo</sup>. That the Civil Law, doth in effect say the same thing is already fully cleared. 2<sup>do</sup>. It is false that the Cannon Law did determin as aforesaid, out of the Superstitious Conceit of *Purgatory*, but the true Reason of the Determination was, because the Canonists supposing indeed erroneously persons deceased to be capable of Remission, thought most justly, That the *Furtum* or *malificium* could not be remitted to the Defunct, nor could his Heir be free of partaking in it, unless he restored the damages, which was most equal and just, and is followed in all these Countries, where it is observed without the least Inconveniencie.

The third and last Heed of Law for the pursuers, is our own *Scots* Law, where albeit we have no decision that exactly Answers the case, yet we have abundance that are paralel. For 1<sup>mo</sup>. The action of recognition is founded upon the delict of the Vassal, and yet doth certainly proceed against his Heir, and to say that this case is singular, because the foresaid Delict is against the Condition of the Vassals own Charter, Is nothing to the purpose for still this action against the Heir proceeds upon the Defuncts delict; and there is no delict whatsoever which is not against the great and common Condition whereby a man holds both his life, liberty, and goods, *Viz*: The Law forbidding Injuries to his Neighbour. But 2<sup>do</sup>. It is certain that tho vicious Intromission: *in quantum* it is penal doth not descend against the Heir of the vicious Intromitter, yet the Heir upon the head of damage, And *in quantum* vitiously Intromitted with, by his predecessor will be lyable in *Solidum*. 3<sup>io</sup> In our law it is without question, that the Heirs of Tutors and Curators may be conveyed, and are lyable for the dole and delicts of their predecessors. As for example if a Tutor or Curator should steal his Minors wries, or to bring the case more near to that in hand, If a Tutor or Curator should steal out of a publick Register a Decree, registrate band or Inhibition belonging to his Minor, whereby his Minor should Incurr great damages by being Involved in pleas, and having his rights in hazard to be taken away or reduced, It is not questioned but that in all or any of these cases, the Minor would have Action Against the Heirs of his Tutor and Curators *in solidum* for damages: And therefore in the pursuers case which is paralel, the like Action ought to be granted. And if to this it should be Answered, that the Action pertaining to the Minor, in the cases supposed, descends from the trust of Tutorie or Curatorie, which in Law is reckoned *quasi contractus*, and differs from a *Maleficium* or *delictum*, It is Replied, that *est*, a Tutorie were not only *quasi Contractus*, but a true Contract, yet it is clear that the Tutor or Curator behaving fraudfully *versantes dolo* in their foresaid trust, an Action, for Damages is competent against their Heirs, which plainly evinces, that where Law sayes, That an Heir conveyed upon the Contract of his predecessor, and for his Fraud therein, is only lyable *in quantum lucratus*, it necessarily must be understood of the penal Action, *de dolo*, but cannot be understood of the *actio rei persecutoria*, without overturning the known principles of Law. 2<sup>do</sup>. The Notion that a Tutor is, *quasi contractus*, and therefore an Action *ex dolo delicto & delicto tutoris*, may and doth descend against his Heirs *in solidum*, is but an empty insignificant Notion. In as farr as *quasi contractus* imports no more, than that a Tutorie hath a resemblance of a Contract. And farder it is obvious, That all the effect of this Resemblance in this Case is, that it aggravats the Fraud & Delict of the Tutor, who thereby betrayed his Trust, and that an Action should be acknowledged to be competent against the Heir upon the aggravate Delict or Wrong of his predecessor, but not upon a simple Delict or Wrong, is plainly inconsistent, and contrary to common Sense. But 3<sup>io</sup>. If the Defenders please themselves in Notions, and seek to find a disparity in the Trust of Tutors and Curators, to make that case differ from the case in hand; They should also remember, That there is really a Common Trust among all Men, And farder, the Law it self is called, *Communis sponso Civitatis*, or the common Contract of the Realm, so that who ever does a wrong, and breaks the foresaid Common Trust and Contract; And consequently his heir, may be made lyable for the damages from the foresaid *quasi contractus*, as well as the heir of any Tutor or Curator.

But



But not to prosecute any farther, these frivolous Alleadgances made by the Defenders, the Pursuers after having cleared that their Action is founded both in the Civil and Cannon Law, and also in our own Municipal Law, do farther proceed to satisfy the Estates of Parliament, That their Action is yet more strongly founded in the Common Principal of Justice and Equity, which certainly are most proper for a Parliamentary Cognition; And to demonstrate this point, It is to be remembered in the entry, that neither Civil nor Cannon Law have any Authority or Force with us, but as they are supported by their intrinsic Reason and Justice, So that if the principles of Justice and Equity do in this case preponderate, The Pursuers are better founded then in all the Civil Law or Cannon Law that can be alleadged, and nothing out of either of these Laws can be opposed against him. But so it is, That the Pursuers Action is most clearly founded in the principles of Justice and Equity, in so far as, It is certain, That out of every Malice, as hath been alleadged, there arises a double Action, *Viz*: One for Damages, which is *rei persecutoria*, And another for Punishment, which is *Penal*; And farther, That the true Ground and Foundation of all Actions is not so much voluntary Consent, (for out of an unlawful Consent, there arises no Action) as a superior rule of Justice, which makes an Action to be equitable, whether it do arise from Consent, or from the parties Fact and Deed, and thus in a malice, there is indeed no Consent; Yet by the force of the superior Rule of Justice, the Delinquent doing the wrong, is as firmly bound to make Reparation, as if he had subscribed to it under his hand, which incontestable principle being once established, it follows in the next place, that as by an obligation or a bond for debt, the debtor binds himself both Body and Goods; So in the case of a delict, the Delinquent by his Fact and Deed, is understood to be bound both Body and Goods, for the Reparation of his parties Damages, And this is the true Ground, wherefore both a Debtor and a Delinquent in his own Life, are equally by Law lyable in person and Goods for payment and Reparation.

But then the Question falls in, whether or not upon these Grounds the Heir of the Delinquent should not be as much lyable, to repair the damages done by the Defunct as the Heir of a Debtor, to pay his Predecessors debt, and that the Heir of the Delinquent is equally lyable, is demonstrated by this Ground, *Viz*: That the only reason making the Heir of a Debtor lyable for his Debts, is, That the Debtor himself was under the Obligation, and that this Obligation affected his Goods as well as his Person, and that the Universitie of the Debtors Goods descending upon his Heir, all Actions do necessarily follow it: And so the Heir is understood to be *una & eadem persona cum Defuncto*; But so it is that all these Grounds do equally hold in the Defuncts being obliged and lyable by his own deed to repair damages: For, 1<sup>mo</sup>. This Obligation affects his Goods as well as his Person. 2<sup>do</sup>. All Obligations affect his Goods *transfusa cum Heiribus* and consequently this obligation for damages descends upon the Heir with the said Universitie. And, 3<sup>do</sup>. The Heir in this Respect being the same person with the Defunct, he ought to be and is in the same manner lyable for Reparation of damages as the Defunct was.

Which Principles are so plain, That if applied to some more palpable and sensible cases are denyable by none, as for example of a Man burns his Neighbours House, or steals and destroys his Neighbours Goods, and the next day dyes, and leaves plentiful fortune to his Heir, but without any benefit by the Defuncts delict, will any man of Common sense say, That the Defuncts Heir may not be concerned by the party injured to make up his damages, and in effect these instances are so convincing, That there is not a Member of the Honourable Estates that can dissent either from their truth or evidence; But the Evasion that some men find, is the disparity of these damages from the Pursuers case; But it is als plain on the other hand, that it is not the present question what sort of damages the Pursuer demands, but whether the Defender be not lyable for damages sustained by the Pursuers, thorow his Predecessors Delict; And this the instances do unanswerably make out, which being once granted, as must be the next step as plainly follows. *Viz*: That the damages sustained by the Pursuers, thorow the Defenders Predecessors resetting of the leafs stolen out of the Register, are obviously as natural, and in effect as great as if the Defenders Predecessors had wilfully burnt and destroyed the Pursuers Charter Chist; And therefore upon all the grounds before laid down the Pursuers action for damages upon the wrong done to them by the Defenders predecessors, should be sustained against the Defender *in solidum*, as a debt truly due by his predecessor, and not *in quantum lucratus*, which is a quality impertinent to the question in hand, and affects any person whatsoever as well as an Heir.

Having thus cleared and demonstrated the grounds of the Pursuers Action, it follows in the next place, that the Defenders objections be shortly answered. 1<sup>mo</sup>. It is alleadged, that the ground of wrong libelled, is the concealing of the stolen leafs, so it is that concealing is only a Crime in the case of Treason. To which it is answered, That the concealing of another Mans Crime is indeed only judged criminal in the case of Treason, but the resetting and concealing of stolen Goods, is not barely the concealing of another Mans crime, but a plain partaking of the Theft, and consequently binding the Resetter and Concealer to the same effects of Reparation and punishment in all the World.

2<sup>do</sup>. It was alleadged that where the crime cannot be constituted, no effect of the crime can be found, but the crime cannot be constituted against a dead man, therefore the reparation of damages which is but accessory, can as little be found against his Heir. To which it is answered, That the Defenders Procurators knowing their own weakness, do continually continue found the deed or fact as a wrong in order to Reparation and as a crime in order to punishment, which yet are in themselves most



most distinct, And therefore it is replyed, That a crime in order to punishment can indeed only be constituted against the Criminal himself. But, 1<sup>mo</sup>. It is false that the reparation of damages is only accessory to the crime, because it is most certain that reparation of damages may be sought against a partie, albeit the crime should never be pursued or constituted against him, And, 2<sup>do</sup>. It is plain, That tho a Crime cannot be constituted against then Defuncts Heir, in order to punishment yet the Defuncts Fact or Deed, may be as well found against the Defuncts Heir in order to damages as the Defuncts obligation may be found in order to payment and here it is to be noticed how the Defenders Procurators did endeavour to impose not only by alledging that a Crime was Lybelled against the Heir of the Criminal, which could not be, and that therefore reparation of damages, the accessory thereof could as little be sought, which is all stuff and calumnie, but also by alledging that the fact could not be constituted against the Heir which is as incongruous and absurd, for facts are facts, and no man of sense speaks of their constitution, but of their probation, and it is without all question that the fact of a Defunct may be as well proven against his Heir as the Defuncts Subscription.

3<sup>io</sup> It was alledged that tho a Defuncts obligation may be proven against his Heir yet his delict could not, because here must be both the fact and the *animus delinquendi*, and the Defunct might have several defences to exculpate his delict, and *animus delinquendi*, which his Heir could not have. To which it was answered, that it is true, a delict includes the *animus delinquendi* as well as the fact. But it is as true, that *animus delinquendi* can never be immediately proven, For that belongs to the Searcher of hearts, but is only presumed from the external facts and deeds; So that these being proven, which certainly may be done against the Heir, as well as against the Defunct, the *animus delinquendi*, and the Delict is also presumed and proven, specially when this is only done in order to reparation of damages.

4<sup>to</sup>. It was objected, that by our Law all Crimes must be proven in face of the pannel and Assyse, and by the late act of Parliament, trial of treason made before the Justice court when the partie was absent were made void, because the partie was absent; To which it is answered, that this is all confusion. For, 1<sup>mo</sup>. It is known, that the Parliament tries treason, both against persons absent and dead. 2<sup>do</sup>. That the said trials before the Justices were reduced, because it was judged an usurpation of a power only competent to the parliament. But, 3<sup>io</sup>. This whole alledgance is nothing to the purpose, For the question is not here about the proving of a Crime in order to punishment, which hath ten times been told to be forraigne to the present purpose, but about the proving of a fact, in order to the damages, which is a case quite distinct, and a man must deny his sense who will deny that a Defuncts burning of a house, or stealing of a Horse, or reletting of stolen Leafs and papers, may be as well proven against the Defuncts Heir for damages as against himself.

But, 5<sup>to</sup>. It was alledged, That it might be of dangerous consequence to make Heirs lyable for their Predecessors delicts and crimes, because this might subject them to uncertain and infinit hazards. To which it is answered, That it was cleared from the beginning, that it is not pretended that the Heir should be lyable for all delicts, and for all damages, there being many crimes and delicts that have no natural and intrinsic damages, such as Murder, Incest, Adultery and the like, which the Caluists call *injuria contra charitatem*. And therefore all their damages being extrinsic, can never affect the Heir, but there are other delicts which are *injuria contra Justitiam*, and that take away or diminish the partie injureds Right, a Thift, Robbery, fire raising and the like, and in these crimes and delicts the damages are both Reparation as against the Defunct himself, nor is there here the least uncertainty or hazard more then was in the case of debts, but on the contrary debts for the most part are more latent and uncertain then deeds of injurie, as is obvious to common sense, And since that the rule of Justice and Equitie doth plainly plead, that damages should be repaired as well by the Heir as well as by the Defunct, and that no damages are here sought, or can be decerned, until the deed be clearly proven: It is evident as the Sun light, that this Objection of Uncertainty and hazard is most frivolous and hath much more place in the case of debts then of damage, tho it be regarded in neither.

And 6<sup>to</sup>. It was objected, that the damages craved, were only extrinsic. *Viz*, expences of pleas and Charges, whereas no part of the Pursuers Lands were taken away, but remains still to them intire; To which it is answered. 1<sup>mo</sup>. That the point referred by the Lords of Session to the Parliament is precisely, *If the Heir may be pursued for Damages arising from the Defuncts delict*, whereby it plainly appears that the Lords were satisfied that there were damages, and how for the same shall be allowed, will come to be a second question, which either the Parliament or the Lords of Session may determine. But, 2<sup>do</sup>. What damages can be more natural upon the reletting of a stolen Decreet, whereby the Pursuers principal evident was taken away, and he brought under hazard *perdende Hereditatis*, as the Law plainly layes in the like cases, and finds the same a sufficient, and very valuable interest.

By all which it is evident, that *Rosbemar* and *Parks* action ought to be sustained for their damages against the Heir of *Abernetbies*, who so palpably and villanously injured them by the foresaid stealing and riving, and reletting and concealing of the Decreet and writes stolen, specially seeing that the Honourable Estates of Parliament cannot but notice in this matter the singular providence of GOD, that so wonderfully discovered this mischief, when it was certain that the papers stolen might have been, for many years, far more easily destroyed then they were stolen, and therefore it is hoped that the same good hand of GOD will lead the Parliament to a determination in justice suitable to so great a discovery.



